

1 depression, NOS, obsessive/compulsive disorder, polysubstance
 2 dependence reported remission, attention deficit disorder) and back
 3 pain, with an onset date of January 1, 1996. (Tr. 126.) After
 4 benefits were denied initially and on reconsideration, Plaintiff
 5 requested a hearing before an administrative law judge (ALJ), which
 6 was held before ALJ James W. Sherry on January 6, 2010. (Tr. 39-
 7 71.) At the hearing, Plaintiff amended the alleged onset date for
 8 SSI benefits to the date of his SSI application, February 15, 2008.
 9 (Tr. 47.) Plaintiff, who was represented by counsel, and vocational
 10 expert (VE) Sharon N. Welter testified. The ALJ denied benefits on
 11 February 11, 2010, and the Appeals Council denied review. (Tr. 1-5,
 12 13-23.) Plaintiff's claim is before this court pursuant to 42
 13 U.S.C. § 405(g).

14 STANDARD OF REVIEW

15 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 16 court set out the standard of review:

17 The decision of the Commissioner may be reversed only
 18 if it is not supported by substantial evidence or if it is
 19 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
 20 1097 (9th Cir. 1999). Substantial evidence is defined as
 21 being more than a mere scintilla, but less than a
 22 preponderance. *Id.* at 1098. Put another way, substantial
 23 evidence is such relevant evidence as a reasonable mind
 24 might accept as adequate to support a conclusion.
 25 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
 26 evidence is susceptible to more than one rational
 27 interpretation, the court may not substitute its judgment
 28 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
Morgan v. Commissioner of Social Sec. Admin. 169 F.3d 595,
 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,
 resolving conflicts in medical testimony, and resolving
 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

1 It is the role of the trier of fact, not this court, to resolve
2 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
3 supports more than one rational interpretation, the court may not
4 substitute its judgment for that of the Commissioner. *Tackett*, 180
5 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
6 Nevertheless, a decision supported by substantial evidence will be
7 set aside if the proper legal standards were not applied in weighing
8 the evidence and making the decision. *Browner v. Secretary of*
9 *Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
10 there is substantial evidence to support the administrative
11 findings, or if there is conflicting evidence that will support a
12 finding of either disability or non-disability, the finding of the
13 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
14 1230 (9th Cir. 1987).

15 SEQUENTIAL EVALUATION

16 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
17 requirements necessary to establish disability:

18 Under the Social Security Act, individuals who are
19 "under a disability" are eligible to receive benefits. 42
20 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
21 medically determinable physical or mental impairment"
22 which prevents one from engaging "in any substantial
23 gainful activity" and is expected to result in death or
24 last "for a continuous period of not less than 12 months."
25 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
26 from "anatomical, physiological, or psychological
27 abnormalities which are demonstrable by medically
28 acceptable clinical and laboratory diagnostic techniques."
42 U.S.C. § 423(d)(3). The Act also provides that a
claimant will be eligible for benefits only if his
impairments "are of such severity that he is not only
unable to do his previous work but cannot, considering his
age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

1 In evaluating whether a claimant suffers from a
2 disability, an ALJ must apply a five-step sequential
3 inquiry addressing both components of the definition,
4 until a question is answered affirmatively or negatively
5 in such a way that an ultimate determination can be made.
6 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
7 claimant bears the burden of proving that [s]he is
8 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
9 1999). This requires the presentation of "complete and
10 detailed objective medical reports of h[is] condition from
11 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
12 404.1512(a)-(b), 404.1513(d)).

13 The Commissioner has established a five-step sequential
14 evaluation process for determining whether a person is disabled. 20
15 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
16 137, 140-142 (1987). In steps one through four, the burden of proof
17 rests upon the claimant to establish a prima facie case of
18 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
19 920, 921 (9th Cir. 1971). This burden is met once a claimant
20 establishes that a physical or mental impairment prevents him from
21 engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a),
22 416.920(a). At step five, the burden shifts to the Commissioner to
23 show that (1) the claimant can perform other substantial gainful
24 activity; and (2) a "significant number of jobs exist in the
25 national economy" which claimant can perform. 20 C.F.R. §§
26 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
27 1498 (9th Cir. 1984).

28 STATEMENT OF THE CASE

29 The facts of the case are set forth in detail in the transcript
30 of proceedings and are briefly summarized here. At the time
31 Plaintiff applied for SSI, he was 26 years old. (Tr. 113.)
32 Plaintiff reported he completed the 11th grade in school and has not

1 obtained his GED. (Tr. 46.) He attended some special education
2 classes while in school. (Tr. 49.) Plaintiff was single and lived
3 in an apartment with his girlfriend at the time of the
4 administrative hearing. (Tr. 46.) His sole source of income at the
5 time was public assistance. (Tr. 48.) Plaintiff indicated he had
6 not had any earnings from work in the last 15 years and had spent
7 time living on the street and in shelters. (Tr. 48-50.) Plaintiff
8 also stated he has had problems with drugs in the past, but had been
9 clean and sober for about a year. (Tr. 50-51.)

10 ADMINISTRATIVE DECISION

11 At step one, ALJ Sherry found Plaintiff had not engaged in
12 substantial gainful activity since the amended alleged onset date.
13 (Tr. 15.) At step two, he found Plaintiff had severe impairments of
14 "psychotic disorder; obsessive compulsive disorder; anti-social
15 personality disorder; and polysubstance abuse (methamphetamine,
16 marijuana and alcohol)," and no severe physical impairment. (Tr.
17 15.) At step three, the ALJ found Plaintiff's impairments, alone
18 and in combination, did not meet or medically equal one of the
19 listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations
20 No. 4 (Listings). (Tr. 16.) The ALJ specifically considered
21 Listings 12.06, 12.08 and 12.09. (Tr. 16.) The ALJ determined
22 Plaintiff could perform a full range of work at all exertional
23 levels. (Tr. 18.) However, the ALJ's residual functional capacity
24 (RFC) assessment included the following nonexertional limitations:

25 [T]he claimant is capable of work limited to simple,
26 routine and repetitive tasks and short, simple
27 instructions; the claimant can maintain concentration,
28 persistence and pace for routine tasks and adapt to work
place changes; the claimant is capable of working with
others on a superficial basis; and the claimant is capable

1 of avoiding workplace hazards within these limitations.

2 (Tr. 18.) After summarizing the medical record and Plaintiff's
3 statements, the ALJ found Plaintiff's statements concerning the
4 intensity, persistence and limiting effects of his symptoms were not
5 credible to the extent they were inconsistent with the ALJ's RFC
6 assessment. (Tr. 18-21.)

7 At step four, the ALJ indicated that Plaintiff has no past
8 relevant work. (Tr. 22.) At step five, based on the VE testimony
9 and considering Plaintiff's age, education, work experience and RFC,
10 the ALJ found there were other jobs existing in significant numbers
11 in the national economy that Plaintiff could perform, including farm
12 worker, fruit II, cook helper and kitchen helper. (Tr. 22-23.) The
13 ALJ concluded Plaintiff had not been disabled since the application
14 date and was therefore ineligible for benefits under the Social
15 Security Act. (Tr. 23.)

16 ISSUES

17 The question presented is whether the ALJ's denial of benefits
18 is supported by substantial evidence and free of legal error.
19 Plaintiff argues the ALJ erred when he (1) improperly rejected the
20 opinions of his treating and examining medical providers; (2)
21 improperly rejected Plaintiff's subjective complaints; and (3)
22 failed to account for numerous limitations identified by Plaintiff's
23 treating and examining medical providers in the hypothetical
24 presented to the vocational expert. (ECF No. 22.)

25 DISCUSSION

26 A. Medical Evidence

27 Plaintiff contends that the ALJ improperly rejected the
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1 opinions of his treating and examining medical providers. (ECF No.
2 22 at 14-19.) Defendant responds that the ALJ's evaluation of the
3 medical opinion evidence is free of harmful legal error. (ECF No.
4 31 at 13-17.)

5 In making his RFC determination in this matter, the ALJ
6 accorded weight to the opinions of consultative examining
7 psychologist Roland Dougherty, Ph.D., and reviewing state agency
8 psychological consultants, Sean Mee, Ph.D., and James Bailey, Ph.D.
9 The ALJ also determined that the opinions of Angelo Ballasiotes,
10 Pharm.D., Crystal Coffey, Pharm.D., and Jana Neal, M.S., Harry
11 Kramer, Ph.D., Christopher Clark, M.Ed., LMHC, and Tracy Molina,
12 MSW, were not persuasive evidence that Plaintiff suffered greater
13 restrictions from a psychological standpoint.

14 The courts distinguish among the opinions of three types of
15 physicians: treating physicians, physicians who examine but do not
16 treat the claimant (examining physicians), and those who neither
17 examine nor treat the claimant (nonexamining physicians). *Lester v.*
18 *Chater*, 81 F.3d 821, 839 (9th Cir. 1996). A treating physician's
19 opinion is given special weight because of his familiarity with the
20 claimant and her physical condition. *Fair v. Bowen*, 885 F.2d 597,
21 604-605 (9th Cir. 1989). Thus, more weight is given to a treating
22 physician than an examining physician. *Lester*, 81 F.3d at 830.
23 However, the treating physician's opinion is not "necessarily
24 conclusive as to either a physical condition or the ultimate issue
25 of disability." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
26 1989) (citations omitted).

27 The Ninth Circuit has held that "[t]he opinion of a
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1 nonexamining physician cannot by itself constitute substantial
2 evidence that justifies the rejection of the opinion of either an
3 examining physician or a treating physician." *Lester*, 81 F.3d at
4 830. Rather, an ALJ's decision to reject the opinion of a treating
5 or examining physician, may be *based in part* on the testimony of a
6 nonexamining medical advisor. *Andrews v. Shalala*, 53 F.3d 1035,
7 1043 (9th Cir. 1995). The ALJ must also have other evidence to
8 support the decision such as laboratory test results, contrary
9 reports from examining physicians, and testimony from the claimant
10 that was inconsistent with the physician's opinion. *Andrews*, 53
11 F.3d at 1042-1043. Moreover, an ALJ may reject the testimony of an
12 examining, but nontreating physician, in favor of a nonexamining,
13 nontreating physician only when he gives "specific," "legitimate"
14 reasons for doing so, and those reasons are supported by substantial
15 record evidence. *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir.
16 1995).

17 Plaintiff was examined by Dr. Dougherty on May 28, 2008. (Tr.
18 312.) Plaintiff reported to Dr. Dougherty that he believed taking
19 "crank" started his obsession with washing his hands and that his
20 symptoms, including auditory hallucinations, started when he was
21 using methamphetamine and marijuana. (Tr. 312-313.) Plaintiff
22 stated that he quit using drugs on February 8, 2008, and his
23 symptoms decreased. (Tr. 313.) Dr. Dougherty diagnosed rule out
24 ADHD; rule out PTSD, in partial remission; marijuana dependence, in
25 remission; alcohol dependence, in remission; methamphetamine
26 dependence, in remission; psychotic disorder, NOS, possibly
27 secondary to methamphetamine use; rule out cognitive disorder, NOS;
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1 obsessive-compulsive disorder, hand washing; antisocial personality
2 traits; rule out antisocial personality disorder; rule out
3 schizotypal personality traits; and reported back problems. (Tr.
4 318.) He gave Plaintiff a GAF score of 60.¹ Dr. Dougherty opined
5 that many of the symptoms Plaintiff reported are likely to have been
6 due to prolonged chemical dependency. (Tr. 318.)

7 On May 31, 2008, Dr. Mee filled out a Psychiatric Review
8 Technique form and Mental Residual Functional Capacity Assessment
9 form. (Tr. 320-336.) Dr. Mee indicated that the record reflected
10 that Plaintiff suffered from anxiety-related disorders, personality
11 disorders and substance addiction disorders, all in remission. (Tr.
12 320.) Dr. Mee checked boxes indicating that Plaintiff had mild
13 restrictions of activities of daily living, moderate difficulties in
14 maintaining social functioning, moderate difficulties in maintaining
15 concentration, persistence or pace, and no episodes of
16 decompensation. (Tr. 330.) Dr. Mee believed Plaintiff was not
17 significantly limited or moderately limited in all areas of
18 functioning and would be able to understand and follow short, simple
19 instructions and maintain concentration and pace for routine tasks,
20 work with others on a superficial basis and travel, adapt to change,
21 avoid hazards and set goals. (Tr. 334-336.) On September 25, 2008,
22 Dr. Bailey affirmed Dr. Mee's opinions and conclusions. (Tr. 470.)

23 The ALJ indicated his finding that Plaintiff is capable of
24 performing unskilled work involving short, simple instructions and

25 ¹A GAF of 60-51 reflects moderate symptoms or moderate
26 difficulty in social, occupational, or school functioning. See
27 DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (4th ed. 1994).
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1 simple repetitive tasks with superficial social interaction is
2 supported by the opinions of Drs. Mee, Bailey and Dougherty. (Tr.
3 21.)

4 The ALJ accorded "little weight" to the Mental Residual
5 Functional Capacity Assessment form completed by Plaintiff's
6 treating medical provider Dr. Ballasiotes on March 4, 2009. Dr.
7 Ballasiotes opined that Plaintiff was markedly or severely limited
8 in 15 of 20 areas of mental functioning and explicitly stated that
9 the assessed limitations "do not include limitations from current
10 alcohol or drug use." (Tr. 473-475.) The ALJ explained that he
11 rejected Dr. Ballasiotes' opinions in this regard because the
12 opinions were unsupported by objective findings and Dr. Ballasiotes
13 failed to separate out the effects of any drug or alcohol abuse.
14 (Tr. 21.) For the reasons provided below, the undersigned judicial
15 officer finds that the rationale provided by the ALJ for rejecting
16 Dr. Ballasiotes' opinions is insufficient.

17 First, as indicated in Social Security Ruling 96-2p:

18 [A] finding that a treating source medical opinion is
19 not well-supported by medically acceptable clinical or
20 laboratory diagnostic techniques or is inconsistent with
21 the other substantial evidence in the case record means
only that the opinion is not entitled to "controlling
weight," not that the opinion should be rejected.

22 The ALJ's assertion that the treating physician's opinion is not
23 supported by objective findings is not a valid reason to outright
24 reject the doctor's opinions.

25 Second, the ALJ's statement that Dr. Ballasiotes' assessment
26 failed to separate out the effects of Plaintiff's drug or alcohol
27 abuse (Tr. 21) is erroneous. Dr. Ballasiotes explicitly stated that
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1 the assessed limitations "do not include limitations from current
2 alcohol or drug use." (Tr. 475.) Moreover, the Ninth Circuit has
3 held it is improper for the ALJ to attempt to separate out the
4 effects of any drug addiction or alcohol abuse (DAA) unless it is
5 first determined that a claimant is disabled. *Bustamante v.*
6 *Massanari*, 262 F.3d 949, 954-955 (9th Cir. 2001). Consequently, even
7 if Dr. Ballasiotes' assessment included limitations resulting from
8 Plaintiff's alcohol or drug abuse, the ALJ is required to first
9 proceed with the five-step inquiry without attempting to determine
10 the impact of DAA on Plaintiff's functioning. *Id.* If the ALJ finds
11 that the claimant is disabled and there is medical evidence of DAA,
12 only then should the ALJ proceed to determine if the claimant would
13 be disabled if he stopped using alcohol or drugs. *Id.* In this
14 case, the ALJ did not proceed in this manner.²

15 The ALJ gave only "some weight" to the Mental Residual
16 Functional Capacity Assessment form completed by Jana Neal, M.S.,
17 and Crystal Coffee, Pharm.D., on December 7, 2009. (Tr. 20, 544-
18 546.) It appears the ALJ failed to give full weight to their
19 opinions because Ms. Neal and Dr. Coffee concluded that "some of
20 these limitations may be impacted by past substance use." (Tr. 20.)

21 It is apparent that the ALJ again erroneously attempts to

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23 ²Defendant argues that this error is harmless because the ALJ
24 ultimately decided that DAA was not material in this case. (ECF No.
25 31 at 17.) However, assessed limitations which are improperly
26 rejected as possibly drug/alcohol related cannot be considered
27 harmless error. It is necessary for ALJs to follow the procedure
28 provided by the Ninth Circuit in *Bustamante*.

1 separate out the effects of DAA without observing the procedure set
2 forth in *Bustamante*. Furthermore, like Dr. Ballasiotes, these
3 medical professionals explicitly indicated that the limitations they
4 assessed "do not include limitations from current alcohol or drug
5 use." (Tr. 546.) Therefore, contrary to the ALJ's conclusion, the
6 assessment of Ms. Neal and Dr. Coffee separated out the effects of
7 any DAA. The ALJ's rationale for giving only "some weight" to their
8 opinion is insufficient.

9 The ALJ also gave only "some weight" to the
10 Psychological/Psychiatric Evaluation form completed by Dr. Kramer on
11 June 4, 2009. (Tr. 646-649.) Dr. Kramer opined that Plaintiff had
12 marked limitations on his abilities to perform routine tasks and to
13 respond appropriately to and tolerate the pressure and expectations
14 of a normal work setting.

15 Although the ALJ indicated that Dr. Kramer's opinion "is
16 generally consistent with the overall medical record," the ALJ
17 offers no explanation for failing to include the marked limitations
18 assessed by Dr. Kramer. The ALJ did note, however, that Dr. Kramer
19 concluded there was a strong possibility that Plaintiff's past
20 psychosis may have been drug induced and that his psychosis may be
21 related to his use of alcohol or illegal drugs. (Tr. 20-21.) It
22 thus appears the ALJ again errs by failing to follow *Bustamante*.

23 The ALJ gave "little weight" to the July 27, 2007,
24 Psychological/Psychiatric Evaluation form completed by Mr. Clark.
25 (Tr. 21.) Mr. Clark opined that Plaintiff had marked restrictions
26 on his abilities to perform routine tasks, relate appropriately to
27 co-workers and supervisors, interact appropriately in public
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1 contacts and respond appropriately to and tolerate the pressure and
2 expectations of a normal work setting. (Tr. 203.) Mr. Clark deemed
3 Plaintiff "seriously disturbed" and indicated Plaintiff had limited
4 employment potential. (Tr. 204.) The ALJ concluded Mr. Clark did
5 not provide sufficient clinical findings to support his assessment
6 and his assessment was inconsistent with the opinions of the state
7 psychological consultants. (Tr. 21.)

8 Finally, the ALJ gave "little weight" to the opinion of
9 examining consultant Ms. Molina. (Tr. 21.) On July 24, 2008, Ms.
10 Molina completed a Psychological/Psychiatric Evaluation form
11 indicating that Plaintiff had marked restrictions on his abilities
12 to understand, remember and follow complex instructions, relate
13 appropriately to co-workers and supervisors, and care for self,
14 including personal hygiene and appearance. (Tr. 639-645.) Ms.
15 Molina opined that medication was not likely to improve Plaintiff's
16 ability to perform in a work setting. (Tr. 641.)

17 The ALJ found Ms. Molina's assessment inconsistent with the
18 overall medical record, the opinion of the state medical
19 consultants, and Plaintiff's range of activities. (Tr. 21.) The
20 ALJ also gave the opinion little weight because it consisted
21 primarily of the state's check-off evaluation form. (Tr. 21.)
22 Although a check-box form may be entitled to little weight, *Crane v.*
23 *Shalala*, 76 F.3d 251, 253 (9th Cir. 1996), Ms. Molina's check-box
24 report contained ample explanation of the bases for her conclusions.
25 (Tr. 639-645.) Furthermore, the state medical consultant, whose
26 opinions the ALJ accorded significant weight, used a similar check-
27 box evaluation form. (Tr. 320-336.) The ALJ did not explain why a
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1 check-box form completed by the state agency consultant was entitled
2 to more weight than the check-box form completed by Ms. Molina.

3 With respect to Mr. Clark and Ms. Molina, Defendant's response
4 brief also contends that the medical providers rendered their
5 opinions during periods when Plaintiff refused to take anti-
6 psychotic medication. (ECF No. 31 at 16.) Defendant asserts that
7 it is further unclear whether Dr. Ballasiotes rendered his opinion
8 during a period when Plaintiff was non-compliant with treatment.
9 *Id.* The ALJ's decision, however, makes no mention of these factors.
10 Accordingly, these assertions will not be addressed by this court.
11 See *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) (it is
12 error for a district court to affirm an ALJ's credibility decision
13 based on evidence that the ALJ did not discuss).

14 Based on the foregoing, the court finds the ALJ failed to
15 provide specific and legitimate reasons for rejecting the opinions
16 set forth by Dr. Ballasiotes, Dr. Coffey and Ms. Neal, Dr. Kramer,
17 Mr. Clark, and Ms. Molina in favor of the opinions of the state
18 medical consultants. *Roberts*, 66 F.3d at 184. It is apparent the
19 ALJ found Plaintiff's past drug and/or alcohol abuse a significant
20 factor in his ultimate determination as he repeatedly mentioned DAA
21 in his evaluation of the medical evidence. Yet, the ALJ did not
22 follow the procedure provided by the Ninth Circuit in *Bustamante*.
23 Because the ALJ did not first determine whether Plaintiff was
24 disabled by all of his impairments, including his DAA, before
25 deciding whether he would be disabled absent the effects of drug and
26 alcohol abuse, this matter must be remanded for additional
27 proceedings.

1 On remand, the ALJ shall reassess Plaintiff's RFC, taking into
2 consideration the opinions of all medical professionals of record,
3 as well as any additional or supplemental medical evidence relevant
4 to Plaintiff's claim for disability benefits. The ALJ shall
5 additionally elicit the testimony of a medical expert at a new
6 administrative hearing to assist the ALJ in formulating a new RFC
7 determination. If Plaintiff succeeds in proving he is disabled with
8 the effects of DAA, the ALJ must then determine whether DAA is
9 material to the determination of disability. *Bustamante*, 262 F.3d
10 at 954-955. If the ALJ finds Plaintiff is not disabled, then
11 Plaintiff is not entitled to benefits and there is no need to
12 proceed with the analysis to determine whether DAA is a contributing
13 factor material to disability. *Id.* However, if the ALJ finds
14 Plaintiff is disabled and there is medical evidence of DAA, then the
15 ALJ must next determine if Plaintiff would be disabled if he stopped
16 using alcohol or drugs. *Bustamante*, 262 F.3d at 954-955.

17 **B. Plaintiff's Credibility**

18 Plaintiff asserts that the ALJ improperly rejected Plaintiff's
19 subjective complaints. (ECF No. 22 at 19-22.) Defendant responds
20 that the ALJ reasonably found Plaintiff's testimony was not fully
21 credible. (ECF No. 31 at 18-19.)

22 It is the province of the ALJ to make credibility
23 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
24 1995). However, the ALJ's findings must be supported by "specific"
25 "cogent" reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
26 1990). Once the claimant produces medical evidence of an underlying
27 impairment, the ALJ may not discredit his testimony as to the
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1 severity of an impairment because it is unsupported by medical
2 evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).
3 Absent affirmative evidence of malingering, the ALJ's reasons for
4 rejecting the claimant's testimony must be "clear and convincing."
5 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). There is no
6 affirmative evidence of malingering in this case; therefore, the ALJ
7 was required to give "clear and convincing" reasons for rejecting
8 Plaintiff's testimony. *Lester*, 81 F.3d at 834.

9 The ALJ determined that Plaintiff's medically determinable
10 impairments could reasonably be expected to cause some of the
11 alleged symptoms; however, Plaintiff's statements concerning the
12 intensity, persistence and limiting effects of these symptoms were
13 not credible to the extent they were inconsistent with the ALJ's RFC
14 determination. (Tr. 19.) The ALJ indicated that the evidence
15 supports that Plaintiff is able to engage in a wider range of
16 activities than alleged, and his impairments are not as severe as he
17 alleged. (Tr. 19.) The ALJ further indicated the objective medical
18 evidence did not support Plaintiff's allegations that his multiple
19 physical and mental symptoms limited him from working entirely. *Id.*

20 While it is true Plaintiff has reported he is able to prepare
21 meals, perform housework, pay bills, socialize with friends, attend
22 church, shop for groceries, attend support group meetings and watch
23 television and movies, the Ninth Circuit has repeatedly asserted
24 that "the mere fact that a claimant has carried on certain daily
25 activities, such as grocery shopping, driving a car, or limited
26 walking for exercise, does not in any way detract from her
27 credibility as to her overall disability." *Vertigan v. Halter*, 260

1 F.3d 1044, 1049-1050 (9th Cir. 2001). A claimant's ability to engage
2 in sporadic activities with periodic rest, such as housework and
3 exercise, does not support a finding that he can engage in regular
4 work activities. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).
5 Furthermore, the ALJ did not identify any material inconsistencies
6 between Plaintiff's testimony that he "had difficulty" doing chores
7 (Tr. 64) and reports of his activities. There is no material
8 inconsistency between having difficulty with activities of daily
9 living and being capable of performing activities of daily living.

10 With regard to the ALJ's indication that the objective medical
11 evidence did not support Plaintiff's allegations, the ALJ cited only
12 the medical evidence that supported this assertion (Tr. 19) and not
13 the medical reports of the other medical professionals of record
14 which tend to support and confirm Plaintiff's claims. *See Gallant*
15 *v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984) (although within the
16 power of the ALJ to make findings concerning the credibility of a
17 witness and to weigh conflicting evidence, the ALJ cannot first
18 reach a conclusion and then attempt to justify that conclusion by
19 ignoring competent evidence in the record that suggests an opposite
20 result). Plaintiff's testimony regarding his limitations is
21 corroborated by many of the medical reports of record. *See supra*.

22 The ALJ is responsible for reviewing the evidence and resolving
23 conflicts or ambiguities in testimony. *Magallanes v. Bowen*, 881
24 F.2d 747, 751 (9th Cir. 1989). It is the role of the trier of fact,
25 not this court, to resolve conflicts in evidence. *Richardson*, 402
26 U.S. at 400. The court has a limited role in determining whether
27 the ALJ's decision is supported by substantial evidence and may not
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1 substitute its own judgment for that of the ALJ even if it might
2 justifiably have reached a different result upon *de novo* review. 42
3 U.S.C. § 405(g). Nevertheless, after reviewing the record, the
4 undersigned determines that the ALJ failed to provide "clear and
5 convincing" reasons for finding Plaintiff not fully credible in this
6 case. *Lester*, 81 F.3d at 834. Accordingly, on remand, the ALJ
7 shall reconsider, reevaluate and accord the appropriate weight to
8 Plaintiff's statements.

9 **C. Vocational Expert**

10 Plaintiff lastly contends that the ALJ failed to account for
11 numerous limitations identified by Plaintiff's treating and
12 examining medical providers in the hypothetical presented to the
13 vocational expert.

14 As indicated above, this matter must be remanded for additional
15 proceedings consistent with *Bustamante*. On remand, the ALJ shall
16 reassess Plaintiff's RFC, taking into consideration Plaintiff's
17 testimony and the opinions of all medical professionals of record,
18 as well as any additional or supplemental medical evidence.
19 Plaintiff's new RFC assessment should be presented to a vocational
20 expert to determine if Plaintiff is capable of performing any other
21 work existing in sufficient numbers in the national economy.

22 **CONCLUSION**

23 The court has the discretion to remand the case for additional
24 evidence and findings or to award benefits. *Smolen v. Chater*, 80
25 F.3d 1273, 1292 (9th Cir. 1996). The court may award benefits if the
26 record is fully developed and further administrative proceedings
27 would serve no useful purpose. *Id.* Remand is appropriate when
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1 additional administrative proceedings could remedy defects.
2 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case,
3 further development is necessary to remedy defects and for a proper
4 determination to be made. Accordingly,

5 **IT IS ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment (**ECF No. 21**) is
7 **GRANTED IN PART**, and the matter is remanded to the Commissioner for
8 additional proceedings consistent with this order.

9 2. Defendant's Motion for Summary Judgment (**ECF No. 30**) is
10 **DENIED**.

11 3. Application for attorney fees may be filed by separate
12 motion.

13 The District Court Executive is directed to file this Order and
14 provide a copy to counsel for Plaintiff and Defendant. Judgment
15 shall be entered for **Plaintiff**, and the file shall be **CLOSED**.

16 DATED August 1, 2012.

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18 S/ CYNTHIA IMBROGNO
19 UNITED STATES MAGISTRATE JUDGE
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